1993

Toby Scott Slingerland v. Douglas M. Baum : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TOBY SCOTT SLINGERLAND,	)	
	)	
Plaintiff/Appellee,	)	
	)	Case No. 930172-CA
vs.	)	
	)	Priority No. 15
DOUGLAS M. BAUM,	)	
	)	
Defendant/Appellant.	)	

BRIEF OF APPELLEE

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE DAVID S. YOUNG PRESIDING

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PARTIES TO THE PROCEEDING BELOW

The caption of the case on appeal contains the names of all named parties in the proceedings in the district court. However, at trial in this matter W. Kevin Jackson, Esq., of Jensen, Duffin, Carman, Dibb & Jackson entered an appearance on behalf of "the Baum child" (the defendant) and his father, Douglas H. Baum, and Gary L. Johnson, Esq., of Richards, Brandt, Miller & Nelson entered an appearance on behalf of United States Fidelity and Guaranty Company, which issued an insurance policy to the defendant's father. See Record at 237.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to section 78-2a-3(2)(k) of the Utah Code.

ISSUE AND STANDARD OF REVIEW

Under the facts of this case, did the trial court abuse its discretion when it denied the defendant's motion to set aside the default and default judgment entered against him?

Standard of Review: A trial court has broad discretion in ruling on a motion to set aside a default judgment, and its decision will not be disturbed on appeal unless an abuse of discretion is "clearly established." Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973). See also Russell v. Martell, 681 P.2d 1193, 1194 (Utah 1984); Board of Educ. of Granite School Dist. v. Cox, 14 Utah 2d 385, 384 P.2d 806, 807 (1963) (an appellate court will disturb the trial court's discretion only if there is "a patent abuse thereof"). On review of a trial court's order denying a motion to set aside a default judgment, the facts are viewed in the strongest light in favor of the trial court's decision. Goglia v. Bodnar, 749 P.2d 921, 929 (Ariz. Ct. App. 1987).

DETERMINATIVE RULE

Rule 60(b) of the Utah Rules of Civil Procedure is determinative of the issue on appeal. The rule is reproduced in the addendum.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action to recover for personal injuries the plaintiff suffered as a result of a one-car accident. The plaintiff was a passenger in the car, and the defendant was the driver. Record ("R.") at 2-3.

B. Course of Proceedings and Disposition in the Court Below

The plaintiff filed this action in Third District Court on January 31, 1992. R. at 2-3. The defendant was personally served with process on February 11, 1992. The defendant failed to answer, and his default was entered on May 18, 1992. Id. at 9.

On June 16, 1992, the case was tried to the court on the issue of damages, id. at 234-313, and a judgment in the amount of $5,623,839 was entered against the defendant on June 17, 1992, id. at 17-18.

On September 11, 1992, the defendant filed a motion to set aside the default and default judgment. Id. at 169. The court denied the motion and entered an order to that effect on October 19, 1992. Id. at 207-08. On October 21, 1992, the defendant filed an objection to the proposed order denying his motion to set aside the default judgment. Id. at 210-11. On December 1, 1992, the court entered an order denying the defendant's objection and providing that its prior order denying the defendant's motion to set aside the default and default judgment would be deemed entered as of December 1, 1992. Id. at 218. On December 21, 1992, the

defendant appealed the order denying his motion to set aside the default and default judgment to the Utah Court of Appeals. Id. at 221. The court of appeals determined that it did not have jurisdiction over the appeal and transferred the appeal to the Utah Supreme Court pursuant to Utah Rule of Appellate Procedure 44. Id. at 227-28. On March 24, 1993, the supreme court assigned the case to the court of appeals.

C. Statement of Facts

On June 1, 1991, the plaintiff, Toby Slingerland, and the defendant, Douglas Baum, were returning from Wendover to Salt Lake City in Baum's car. R. at 256. Baum was driving, and Slingerland, his passenger, was asleep. Id. Baum fell asleep at the wheel, the car rolled, and Slingerland was left a quadriplegic as a result of the accident. Id. at 2 ¶ 4 & 176 ¶ 2.

Shortly after the accident, Baum notified United States Fidelity and Guaranty Insurance Company ("USF&G") of the accident and requested coverage. Id. at 177 ¶ 3. USF&G told him that it would not cover the accident. Id. ¶ 4.

Slingerland filed this action on January 31, 1992, to recover for the injuries he sustained as a result of Baum's negligence. Id. at 2-3. Baum was duly served with a summons and complaint on February 11, 1992. Id. at 5-7.

Baum discussed the lawsuit with an attorney, who advised him that liability was almost certain and that "probably [his] best

option would be to eventually file for bankruptcy." Id. at 177 ¶ 9.

Baum did not file an answer, and on May 18, 1992, his default was entered. Id. at 9.

That same day, the judge assigned to the case informed Slingerland's attorney that she was acquainted with Slingerland's aunt and would recuse herself if the parties felt it was necessary. Id. at 8. The court ordered Slingerland's attorney to contact the defendant and inform him of the court's position, which he did by a letter dated May 19, 1992. See id. at 8 & 10. Counsel also notified Baum of the scheduled trial date. Id. at 10. Baum did not respond to this letter, but the trial judge, on her own motion, recused herself, and the case was reassigned. Id. at 11 & 12.

A trial on the issue of damages was held on June 16, 1992. See id. at 234. At the trial, David R. Olsen appeared on behalf of the plaintiff, Slingerland. The court also noted the appearances of Gary L. Johnson representing USF&G and Kevin Jackson, who stated he was representing "the father, the Baum child, the insurance policy in question." Id. at 237; see also id. at 235. Mr. Johnson and Mr. Jackson indicated that they were there to "monitor" the proceedings. The court invited them to participate in the proceedings:

> If either of you had any interest in respect to your respective clients in terms of examining or questioning any of the evidence that might be presented before the court I would like to hear that. I'm not inviting major contest, if that's not appropriate. You know your case

> better than I do, but at the same time if there were to be information that could help me evaluate this better it would be appreciated.

Id. at 238. Mr. Johnson and Mr. Jackson acknowledged the court's invitation, id., but declined to ask any questions of the witnesses or make any other comments.

At the close of the evidence, the court repeated its offer to let counsel make any inquiries of witnesses or any comments they wished to make. Id. at 307. Again, Mr. Johnson and Mr. Jackson declined. Id. The court then made its ruling on damages, and a judgment was entered in favor of Mr. Slingerland and against Mr. Baum as follows:

Special damages:	$4,623,839
General damages:	$1,000,000
Total damages:	$5,623,839

Id. at 17-18.

On July 9, 1992, USF&G filed an action against Baum, his father and Slingerland in the United States District Court for the District of Utah, seeking a declaratory judgment that it owed no duty to defend against or provide coverage for Slingerland's claims. See id. at 188; Appellant's Brief at 4 ¶ 10.

On August 18, 1992, the Baums filed a counterclaim against USF&G in the declaratory judgment action alleging that USF&G had acted in bad faith in refusing to settle Slingerland's claims for the $100,000 policy limit. See R. at 188 ¶ 7.

After the Baums counterclaimed for bad faith, USF&G retained new counsel to represent Baum. Appellant's Brief at 4 ¶ 11 & 13. On September 11, 1992, almost three months after the judgment was entered, the new counsel USF&G had retained for Baum filed a motion to set aside the default and default judgment. R. at 169. The court denied Baum's motion to set aside the default and default judgment, id. at 208 & 218-19, and this appeal followed.

SUMMARY OF ARGUMENT

The trial court had considerable discretion under Utah Rule of Civil Procedure 60(b) in ruling on Baum's motion to set aside the default judgment entered against him. Before Baum could have the judgment set aside, he had to clearly establish (1) that the judgment was entered as a result of mistake, inadvertence or excusable neglect, (2) that his motion to set aside the judgment was timely, (3) that he had a meritorious defense to Slingerland's claim, and (4) that Slingerland would not be prejudiced if the judgment were set aside.

None of the factors Baum relied on constituted mistake, inadvertence or excusable neglect within the meaning of rule 60(b). Thus, Baum did not meet his burden of showing a sufficient excuse for his default. In fact, Baum's own testimony clearly established that the default judgment entered against him was the result of his own deliberate decision to suffer a default judgment rather than incur the costs of defending this action. That decision was made only after he had consulted with counsel of his choice. Rule 60(b)

does not authorize the court to grant relief from poor tactical decisions. See Point I.

The trial court therefore did not have to reach the issues of timeliness, meritorious defense and prejudice. Nevertheless, Baum did not meet his burden of showing that his motion was timely, see point II; that his alleged defenses would have led to a different result, see point III; or that Slingerland would not be prejudiced if the judgment were set aside, see point IV.

Thus, under the facts of this case, "the lower court did not err [in refusing to set aside the default judgment], but . . . [Baum] did by urging too little too late." See Heath v. Heath, 541 P.2d 1040, 1041 (Utah 1975).

ARGUMENT

I.

BAUM DID NOT MEET HIS BURDEN OF SHOWING SUFFICIENT GROUNDS TO JUSTIFY SETTING ASIDE THE DEFAULT AND JUDGMENT.

Baum argues that default judgments are generally disfavored because they run counter to the policy favoring resolution of disputes on their merits. However, Utah courts have consistently rejected the argument that that policy alone justifies setting aside a default judgment. See, e.g., State v. Musselman, 667 P.2d 1053, 1055 (Utah 1983); Heath v. Mower, 597 P.2d 855, 858 (Utah 1979); Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973); Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, 742-44 (1953). That is because there are equally strong

countervailing policies, such as "the strong policy favoring the finality of judgments." See Kulchar v. Kulchar, 462 P.2d 17, 19 (Cal. 1969) (Traynor, C.J.). "Obviously, the [plaintiff's] interest[s] must also be protected . . . ." Larsen v. Collina, 684 P.2d 52, 56 (Utah 1984); see also Pitts v. Pine Meadow Ranch, Inc., 589 P.2d 767, 768 (Utah 1978).

> A rule which would permit the re-opening of cases previously decided because of error or ignorance during the progress of the trial would in a large measure vitiate the effects of res judicata and create a hardship to the successful litigant in causing him to prosecute his action more than once and possibly lose the ability to collect his judgment . . . .

Warren, 260 P.2d at 743.

The "more pertinent" public policies in a case such as this are those found in the rules of civil procedure governing the time for answering a complaint and the setting aside of judgments. Cf. Mini Spas, Inc. v. Industrial Comm'n, 733 P.2d 130, 132 (Utah 1987). "Public policy requires that pressure be brought upon litigants to use great care in preparing cases for trial and in ascertaining all the facts." Kulchar, 462 P.2d at 19 (quoting Restatement of Judgments § 126 comment a). The rules of procedure "are positive in their application and are designed to expedite litigation." Warren, 260 P.2d at 744. They give the parties an opportunity to have their case tried on the merits, but a party does not have to take advantage of that opportunity. If the requirements of the rules of civil procedure are met, a judgment will not be set aside "merely because the particular individual

against whom it was rendered did not in fact have an opportunity to present his claim or defense." Id. at 743.

If a default judgment could be set aside merely because the defendant, who had notice of the action and an opportunity to appear and defend, had not been heard on the merits, the rules of civil procedure would be nullified and our system of justice undermined. See Warren, 260 P.2d at 743-44. Thus, this court has held that "the requirements of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded to him . . . ." Id. at 744; Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (Utah 1973). Courts deny relief "if a party has been given notice of an action and has not been prevented from participating therein." Kulchar, 462 P.2d at 19.

Whether or not a default judgment should be set aside depends on the "peculiar facts and circumstances" of the particular case. Heath v. Mower, 597 P.2d 855, 858 (Utah 1979). The Utah Supreme Court has therefore committed the decision to grant or deny relief from judgments to the sound discretion of the trial court. The trial court has considerable discretion in ruling on a motion to set aside a default judgment, and an appellate court will reverse its ruling "only if it is clear the trial court abused its discretion." Russell v. Martell, 681 P.2d 1193, 1194 (Utah 1984) (emphasis added). Accord Masters v. LeSeuer, 13 Utah 2d 293, 373 P.2d 573, 573-74 (1962). The rule that courts will generally

"incline towards" granting relief to a party who has not had an opportunity to be heard "is ordinarily applied at the trial court level," in the exercise of that court's broad discretion. Warren, 260 P.2d at 744; Airkem, 513 P.2d at 431. The fact that the trial court could have granted a defaulting party an opportunity to be heard does not mean that the court abused its discretion in denying relief. Warren, 260 P.2d at 744. See also Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986) ("That some basis may exist to set aside the default does not require the conclusion that the court abused its discretion in refusing to do so when facts and circumstances support the refusal").

The cases Baum relies on for his policy argument "are predicated upon the hypothesis that there has been some mistake or excusable neglect on the part of the movant from which, in justice and equity, he should be relieved." Chrysler v. Chrysler, 5 Utah 2d 415, 303 P.2d 995, 996 (1956). Thus, the "pertinent inquiry" is not whether Baum had his day in court but whether the trial court abused its discretion in concluding that Baum did not show sufficient justification for setting aside the default judgment. See Chrysler, 303 P.2d at 996.

Motions to set aside default judgments are governed by Utah Rule of Civil Procedure 60(b), which states: "On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or

excusable neglect . . . ." Utah R. Civ. P. 60(b) (emphasis added).[1] If the trial court could have concluded from the record that Baum's asserted justification for setting the judgment aside did not amount to mistake, inadvertence or excusable neglect, then its order denying Baum relief from that judgment must be affirmed. See, e.g., Warren, 260 P.2d at 744. See also Western Union Tel. Co. v. Dismang, 106 F.2d 362, 364 (10th Cir. 1939) ("It is an abuse of discretion . . . to open or vacate a judgment where the moving party shows no legal ground therefor or offers no excuse for his own negligence or default").

The Utah Supreme Court has generally found mistake, inadvertence or excusable neglect only where it appeared that the defendant may not have received proper notice, where the defendant was induced not to file an answer by the plaintiff or the court or where the defendant was prevented from doing so by circumstances beyond his control. See, e.g., May v. Thompson, 677 P.2d 1109, 1110 (Utah 1984) (the evidence was contradictory as to whether the defendant ever received the complaint); Helgesen v. Inyangumia, 636 P.2d 1079, 1081-82 (Utah 1981) (the plaintiff knew the defendant intended to defend, failed to provide requested information, and gave the impression that no default would be taken). See also Valley Leasing v. Houghton, 661 P.2d 959, 960 (Utah 1983) (no abuse

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[1] Although rule 60(b) lists seven reasons for setting aside a judgment, Baum relies only on the first of these. He claims that the judgment should be set aside only for "mistake, inadvertence, or excusable neglect." See Appellant's Brief at 6.

of discretion to refuse to set aside a default judgment where defendant made no showing that he was prevented from appearing by circumstances beyond his control); Airkem, 513 P.2d at 431 (defendant must show that he used due diligence and was prevented from appearing by circumstances beyond his control); Warren, 260 P.2d at 742 (relief may be granted for procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense).

Baum claims that, at the time the default was entered, he was a young man with no legal experience, he was suffering emotional distress from having been sued by his best friend and was in a state of confusion, partly as a result of his conversations with an attorney, who told him that he had little option but to declare bankruptcy, and with USF&G, which told him that he had no insurance coverage. As a result, he felt that his only option was to do nothing. Baum claims that his mistaken judgment and confused state of mind constitute "mistake" and "excusable neglect" within the meaning of rule 60(b)(1). See Appellant's Brief at 8-9. Cf. R. at 176-78. The trial court properly rejected these arguments.

Baum's claims of youth and legal inexperience were insufficient to justify setting aside the judgment. There was no evidence of Baum's age at the time this action was filed. See R. at 176-78. Nevertheless, Baum admits that he was twenty-two years old at the time the default was entered, see Appellant's Brief at 8; R. at 172, which is well past the age of majority and well past

the age for which a person becomes responsible for his actions. See Utah Code Ann. §§ 15-2-1 (1992) & 76-2-301 (1990).

Moreover, Baum's actions belie his claim that he lacked sophistication in legal matters.[2] He contacted his insurance company even before any action was filed, notifying it of the accident and requesting coverage. R. at 177 ¶ 3. He also sought the advice of an attorney. Id. ¶ 9. And his family attorney appeared at the trial on damages. Id. at 237.

In any event, Utah courts have rejected the argument that inexperience with the legal process is a sufficient reason to set aside a default judgment, especially where, as here, the defendant in fact discussed the matter with an attorney. See, e.g., J.P.W. Enters., Inc. v. Naef, 604 P.2d 486, 488 (Utah 1979). Accord Original Appalachian Artworks, Inc. v. Yuil Int'l Trading Corp., 105 F.R.D. 113, 116 (S.D.N.Y. 1985). See also Bahr v. Pasky, 439 A.2d 174, 175-78 (Pa. Super. Ct. 1981) (inexperience with legal matters and illness do not justify setting aside a default judgment). Thus, the trial court did not abuse its discretion in concluding that Baum's age and alleged lack of legal experience did not excuse his failure to answer Slingerland's complaint.

Baum's claimed emotional distress and confusion did not justify relief from the judgment either. See, e.g., Smallridge v.

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[2] Baum's lack of legal experience stems from the fact that he had never been sued before. R. at 177 ¶ 7. He cites no authority, however, for his proposed rule that every defendant is entitled to his first default.

Macalaster Bicknell Co. of N.Y., 522 N.Y.S.2d 52, 52 (App. Div. 1987) (confusion and great personal stress were insufficient to justify default). "Illness alone is not sufficient to make neglect in defending one's action excusable." Warren, 260 P.2d at 743. In Warren, the defendant claimed that he had been seriously ill at the time he was served. The court stated: "We are not told the nature of the illness [but] it does not appear that [the defendant] was so incapacitated that he could not have called an attorney to have his rights . . . protected." 260 P.2d at 743. Here, Baum claims he was emotionally ill, not physically ill, as the defendant in Warren apparently claimed, but the distinction is irrelevant. Baum does not claim that his emotional state prevented him from consulting an attorney. Rather, he admits that he in fact sought and followed legal advice.

Nor does Baum claim that he was unaware of the consequences of his failure to respond to Slingerland's complaint. Baum does not claim, for example, that he was so incapacitated that he could not read and understand the summons. The summons was "self-explanatory to anyone who can read." Board of Educ. of Granite School Dist. v. Cox, 14 Utah 2d 385, 384 P.2d 806, 808 (1963). It clearly stated that Baum was required to file an answer in writing within twenty days and that, "[i]f you fail to do so, judgment by default will be taken against you for the relief demanded in [the] Complaint." R. at 5. Cf. Bahr, 439 A.2d at 178 (where the defendant's illness did

not prevent her from reading the papers served on her, her failure to respond was inexcusable).

Baum does not claim that the attorney he consulted told him he did not have to answer the complaint. He only claims that the attorney told him that "liability is almost certain" (which it would be even if a jury were to apportion some fault to Slingerland), that Slingerland's claim would be dischargeable in bankruptcy and that Baum's "best option" would "probably" be to eventually file for bankruptcy.[3] R. at 177 ¶ 9. There is no evidence that Baum or the attorney he consulted could not have filed an answer or asked for an extension of time within the required time. Thus, the trial court did not abuse its discretion in concluding that Baum's alleged confusion did not justify setting aside the default judgment.

Finally, any dispute between Baum and USF&G regarding coverage did not excuse Baum's default. Baum admits that USF&G told him that there was no coverage for the lawsuit even before it was

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[3] Baum does not claim that this advice was bad. But even if he did, that would not constitute mistake or excusable neglect. See, e.g., Russell v. Martell, 681 P.2d 1193, 1195 (Utah 1984) (any negligence on the part of the defendant's attorney was attributable to the defendant); Gardiner & Gardiner Builders v. Swapp, 656 P.2d 429, 430 (Utah 1982) (the negligence of the defendant's attorney may be imputed to him). See also St. Joe Paper Co. v. Marc Box Co., 394 A.2d 1045, 1047-48 (Pa. Super. Ct. 1978) (mere confusion or mistake or inadvertence of counsel, without more, is insufficient to set aside a default).

filed.[4] He still had over three months to find an attorney and file an answer. Even if Baum's failure to respond to Slingerland's complaint was the result of USF&G's actions, USF&G's actions did not excuse Baum's neglect. See Goglia v. Bodnar, 749 P.2d 921, 929 (Ariz. Ct. App. 1987) (the defendant's failure to take any action for two months after his insurer told him he would have to handle the case himself was inexcusable); Cyrus v. Haveson, 135 Cal. Rptr. 246, 252 (Cal. Ct. App. 1976) (reliance on an insurer after defendants had notice that the insurer was not protecting their position in the litigation was inexcusable neglect).

In short, Baum did not meet his burden of showing such a mistake, inadvertence or excusable neglect as would justify relief under rule 60(b)(1). At a minimum, the facts showed an indifference and lack of diligence on the part of all concerned, which are not grounds for vacating a default judgment. See Russell v. Martell, 681 P.2d 1193, 1195 (Utah 1984). But in fact, the

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[4] Baum claims that he talked to Slingerland's lawyer and, as a result of those conversations, "I was of the understanding that he would try to work things out with the insurance company." R. at 177 ¶ 8. Obviously, Slingerland's attorney was not able to "work things out" with USF&G. That's why Slingerland had to file this action. In any event, Baum does not say that Slingerland's attorney ever told him that he did not have to respond to the complaint. Neither settlement discussions nor conversations with opposing counsel constitute mistake or excusable neglect where, as here, the defendant seeks independent counsel and counsel for the plaintiff does nothing to indicate that the defendant does not have to answer the complaint. See Katz v. Pierce, 732 P.2d 92, 93-94 (Utah 1986). Cf. Pacer Sport & Cycle, Inc. v. Myers, 534 P.2d 616, 617 (Utah 1975) (where defendant assumed the action had been taken care of and therefore took no steps to answer the complaint, his claim did not even approach "excusable neglect").

circumstances showed more than mere indifference or lack of diligence; they clearly established an informed decision to let a default judgment be taken.

The summons clearly stated and Baum clearly understood that a default judgment would be entered if he did not answer the complaint. Knowing that there was no insurance coverage and perhaps recognizing his lack of experience in legal matters, he contacted an attorney, who advised him that liability was almost certain and that his best option would be to file for bankruptcy. After weighing all his alternatives, including the cost of defending the lawsuit now or discharging the judgment later through bankruptcy, he decided to let a default judgment be entered against him. Baum's decision not to appear and defend was thus an informed, reasoned, deliberate choice, which hardly constitutes mistake, inadvertence or excusable neglect. See Board of Educ. of Granite School Dist. v. Cox, 14 Utah 2d 385, 384 P.2d 806, 808 (1963). See also Original Appalachian Artworks, Inc. v. Yuil Int'l Trading Corp., 105 F.R.D. 113, 116 (S.D.N.Y. 1985); Brand v. NCC Corp., 540 F. Supp. 562, 563-64 (E.D. Pa. 1982).

Perhaps most significant, the decision not to appear but to suffer a default judgment was not Baum's alone. After Baum's default had been entered but before any judgment was entered, Baum was notified of the date of the trial on damages and apparently notified not only his insurer but also his family's attorney, both of whom appeared at trial and were given an opportunity to

participate. Even then, it was not too late to have the default set aside and the matter heard on the merits. Yet Baum's insurer and attorney both chose to sit by and let a default judgment be entered.

Baum may regret his decision to allow a default judgment to be entered against him, but bad judgment does not constitute "mistake, inadvertence, . . . or excusable neglect" under rule 60(b)(1).

In fact, Baum has never claimed he made a bad decision. In moving to set aside the default judgment, he only claimed that "the situation [has] now changed." R. at 178 ¶ 12. The only thing that has changed since this action was filed, however, is that USF&G has also sued Baum, for a declaratory judgment that it had no duty to defend or indemnify Baum, and Baum has filed a counterclaim. See id. ¶ 11. It was only after Baum counterclaimed against USF&G for bad faith in the declaratory judgment action that anyone bothered to try to have the default judgment set aside. Now that USF&G has apparently had second thoughts about its decision to deny Baum coverage, it has hired an attorney to try to overturn the default judgment. But "insurer's remorse" is not a recognized excuse for setting aside a default judgment under rule 60(b). USF&G may not be happy now with the decision to do nothing, but it had ample opportunity to intervene on Baum's behalf before the judgment was entered and deliberately chose not to. It had notice of the proceedings throughout and even appeared at trial and declined the court's offer to participate and cross-examine the witnesses.

Having made the choice to deny coverage and sit by while a default judgment was taken, USF&G cannot now go back and undo its decision under the guise of mistake, inadvertence or excusable neglect on the part of its insured. See Candelaria v. Avitia, 269 Cal. Rptr. 32, 36 (Cal. Ct. App. 1990) (an insurer was not entitled to relief from a default judgment against its insured where the insurer advised the plaintiff that it was denying coverage). Cf. Richas v. Superior Court, 652 P.2d 1035, 1039 (Ariz. 1982) (insurer's failure to establish excusable neglect is attributable to its insured).

In short, the trial court did not abuse its discretion in deciding that, under the facts of this case, Baum failed to show a sufficient excuse to justify setting aside the default judgment under rule 60(b). The facts clearly established an informed decision to allow a default judgment to be taken, not "mistake, inadvertence . . . or excusable neglect." Rule 60(b) was not meant to relieve a litigant from strategic or tactical decisions which later prove to be improvident. Good Luck Nursing Home, Inc. v. Harris, 636 F.2d 572, 577 (D.C. Cir. 1980). See also 7 James W. Moore & Jo Desha Lucas, Moore's Federal Practice ¶ 60.22[2] at 60-182 (1992) ("a party who . . . makes an informed choice as to a particular course of action will not be relieved of the consequences when it subsequently develops that the choice was unfortunate"). "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." Ackermann v. United States, 340 U.S. 193, 198 (1950).

II.

THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT WAS UNTIMELY.

Before Baum could obtain relief from the judgment, he had the burden of convincing the trial court not only that the judgment was entered against him through excusable neglect (or one of the other reasons specified in rule 60(b)), but also that his motion to set aside the judgment was timely. State v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983).

Baum's motion to set aside the default and default judgment was filed on September 11, 1992, more than three months after the default he asked to have set aside, which was entered on May 18, 1992, and nearly three months after the default judgment, which was entered on June 17, 1992. Baum argues that his motion was timely because it was filed within three months of the default judgment.

Rule 60(b), however, requires that a motion to set aside a judgment for mistake, inadvertence or excusable neglect be made "within a reasonable time and . . . not more than 3 months after the judgment . . . was entered or taken." Utah R. Civ. P. 60(b) (emphasis added). Utah courts have not yet addressed the issue, but courts construing the analogous federal rule have held that a motion for relief from judgment can still be untimely even if it is filed within the outside time limit specified in the rule if, under the circumstances, it was not filed within a reasonable time. See, e.g., Simon v. Pay Tel Management, Inc., 782 F. Supp. 1219, 1228

(N.D. Ill. 1991), aff'd, 952 F.2d 1398 (7th Cir. 1992) (table); Cavalier Label Co. v. S.S. Lilika, 71 F.R.D. 395, 397 (S.D.N.Y. 1976).[5] Thus, the fact that Baum's motion was filed barely within three months after the default judgment was entered does not necessarily make that motion timely. As the delay in making the motion approaches the outer limits of the allowable time, the burden on the defendant to show that the delay was reasonable increases. Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 656 (2d Cir. 1979).

Admittedly, Slingerland did not argue in the trial court that Baum's motion was untimely because it was not filed within a reasonable time after the default judgment.[6] However, this court can affirm the district court on any proper ground. See, e.g., Rees v. Intermountain Health Care, Inc., 808 P.2d 1069, 1078 n.20 (Utah 1991); Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988). Where the trial court does not specify the basis for its denial of a motion to set aside a final order or judgment, the appellate court can sustain its action if it appears from the record that the motion was not filed within a reasonable time.

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[5] Utah Rule of Civil Procedure 60(b) is substantially similar to Federal Rule of Civil Procedure 60(b). This court can therefore look to federal courts' interpretation of the federal rule when construing the Utah rule. See Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952, 958 (Utah 1984).

[6] Slingerland challenged the timeliness of Baum's motion only as it related to the default certificate. R. at 191.

Young v. Western Piling & Sheeting, 680 P.2d 394, 395 (Utah 1984).

Moreover, even if Slingerland were precluded from arguing that Baum's motion was barred solely because it was untimely, the trial court could properly consider Baum's promptness or dilatoriness in bringing the motion when it exercised its discretion to deny the motion. See, e.g., American Metals Serv. Export Co. v. Ahrens Aircraft, Inc., 666 F.2d 718, 720 (1st Cir. 1981). See also Young, 680 P.2d at 395 (the trial court acted well within its discretion in denying a motion in view of the laches of the movant).

In deciding whether a rule 60(b) motion was brought within a reasonable time, courts have considered the interest in finality, the reason for the delay, the litigant's practical ability to learn earlier of the grounds he relied on and the prejudice to the opposing party. See, e.g., Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981).

Here, Baum knew of his potential liability and contacted his insurance company before any action was even filed. He was served with process on February 11, 1992. His time to answer the complaint expired on March 2, 1992. He had another two and a half months before Slingerland even sought a default certificate. Another month passed before the trial on damages. Baum clearly had notice of the trial. In fact, two attorneys appeared at the trial --one on behalf of Baum and his father and one on behalf of the family's insurer. They chose not to participate in the trial, and a default judgment was entered. Baum then waited nearly three

months to file a motion to set aside that judgment--well after the time for appealing from the judgment had expired. In fact, it was only after the Baums had counterclaimed against USF&G for bad faith that USF&G retained counsel to bring a motion on Baum's behalf. Also, the prejudice to Slingerland if the judgment were set aside was apparent. See infra pt. IV.

All of these facts and circumstances were before the trial court. The trial court could reasonably conclude from these facts that Baum's motion was untimely. In any event, this court cannot say that, in light of all the facts, the trial court abused its discretion in refusing to set aside the default judgment.

III.

BAUM DID NOT MEET HIS BURDEN OF SHOWING A MERITORIOUS DEFENSE.

The third element which Baum had to meet to prevail on his rule 60(b)(1) motion was to show that he had a meritorious defense to Slingerland's claims. See State v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983).

Baum claims that the merits of the case are not an issue on a motion to set aside a default judgment. Appellant's Brief at 10. Slingerland agrees that the trial court did not have to consider whether or not Baum had a meritorious defense, not because Baum did not have to show a meritorious defense, but because Baum did not meet his threshold burden of showing excusable neglect or some other reason justifying relief from the default judgment. The

existence of a meritorious defense, standing alone, does not excuse the defendant's failure to abide by the rules of procedure. See, e.g., Simon v. Pay Tel Management, Inc., 782 F. Supp. 1219, 1230 (N.D. Ill. 1991), aff'd, 952 F. Supp. 1398 (7th Cir. 1992) (table). It is clear that, under Utah law, the issue of a meritorious defense does not even arise until the movant first establishes a sufficient excuse for allowing a default judgment to be entered against him. In Board of Education of Granite School District v. Cox, one of the cases Baum relies on,[7] the court stated:

> Appellant . . . has set forth defenses which apply to the merits of the case and have no application as to why appellant did not answer within the time allotted. We are concerned only with why he did not answer, not with what kind of answer would he give if he were so inclined. This latter question arises only after consideration of the first question and a sufficient excuse therefrom being shown.

14 Utah 2d 385, 384 P.2d 806, 808 (1963) (emphasis added). Where, as here, the movant fails to establish excusable neglect or some other recognized excuse for a default judgment, neither the trial court nor this court has to reach the issue of meritorious defense. See Musselman, 667 P.2d at 1056 ("it is unnecessary, and moreover inappropriate, to even consider the issue of meritorious defenses unless the court is satisfied that a sufficient excuse has been

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[7] In Larsen v. Collina, 684 P.2d 52 (Utah 1984), the other case Baum relies on, the court said, "Usually, it is not appropriate on Rule 60(b) motions to examine the merits of the claim decided by the default judgment." 684 P.2d at 55 (emphasis added). In other words, it was Slingerland, not Baum, who did not have to establish the merits of his claim.

shown"); Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, 744 (1953) (having concluded that the trial court did not abuse its discretion in rejecting the defendant's proffered excuse, "it becomes unnecessary to consider the question of whether or not appellant had a meritorious defense"). Thus, the trial court did not err in failing to expressly address the merits of Baum's asserted defense.

Moreover, Baum did not meet his burden of establishing a meritorious defense.

"A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered." Musselman, 667 P.2d at 1057 (quoting Lopez v. Reserve Ins. Co., 525 P.2d 1204, 1206 (Colo. Ct. App. 1974)).

Baum did not even raise the issue of meritorious defense in his moving papers. See R. at 169-79. The only evidence Baum offered to show a meritorious defense was his own affidavit, in which he admitted that, while he was driving his car with Toby Slingerland as a passenger, he "momentarily fell asleep, the car rolled, and Toby Slingerland was seriously injured in the accident." R. at 176 ¶ 2. His affidavit also indicated that he had talked to an attorney who advised him that "liability is almost certain." Id. at 177 ¶ 9.

Baum's affidavit failed to show any defense--let alone a meritorious defense--to Slingerland's claims. Cf. Wilcox v.

Parkland Dev. Corp., 550 N.Y.S.2d 478, 479 (App. Div. 1990) (where the only affidavit addressing the liability issue did no more than imply that the plaintiff may have been guilty of contributory negligence, it was reasonable to conclude that the defendant's only defense was an "uncompelling one"). Relying on Slingerland's testimony at the damages trial, however, Baum argues that Slingerland's comparative fault in agreeing to return home without sleep, in going to sleep on the way home, in taking off his seat belt and in yelling at Baum when he started to go off the road constitutes a meritorious defense.

Although Slingerland testified that he and Baum had been at Wendover most of the night and decided to drive home after they started getting tired, Slingerland also testified that they stopped on their way home so that Baum could get a Coke, and Slingerland asked Baum "if he'd be okay." R. at 256. Apparently, Baum said he would, and Slingerland thought Baum would be all right because "he had been working graveyards at Blockbuster like the past four months before this." Id. It was only then that Slingerland took off his seat belt and went to sleep.

Slingerland's failure to use his seat belt did not constitute a meritorious defense, and evidence of that failure was inadmissible on the issues of both liability and damages. Utah Code Ann. § 41-6-186 (1988).

Moreover, even if Slingerland were comparatively negligent in agreeing to go home when he and Baum were tired, it is highly

unlikely that a jury would apportion more fault to Slingerland, the sleeping passenger, than to Baum, the driver. Thus, any comparative fault of Slingerland would not bar his recovery altogether. See Utah Code Ann. § 78-27-38 (1992). Baum would still be liable for at least 51 percent of Slingerland's damages--$2.87 million. There is no indication that Baum could pay this judgment any more than he could pay the $5,623,829 judgment or that he would have decided not to suffer a default judgment if he had known his liability would have only been $2.87 million. Thus, as a practical matter, any defense Baum may have had based on Slingerland's alleged comparative fault would not have resulted in a different judgment because it would not have made any difference in Baum's decision to forego a trial and allow a default judgment to be entered.

Baum also claims that the jury should have been allowed to consider the amount of damages. He claims that the court's special damage award of $4.6 million was based "on the brief testimony of Paul Randle[,] which was accepted without significant inquiry by the court and without any cross-examination." Appellant's Brief at 11-12 (citation omitted). He claims that he should have been given an opportunity to have his attorney "examine the evidence" and, "if appropriate," to present his own witnesses on the plaintiff's damage claim. R. at 178 ¶ 12.

In fact, Baum had an opportunity to have his attorney "examine the evidence" on Slingerland's damage claim. Attorneys for both

USF&G and the Baums attended the damage trial. At the beginning of the trial, the court invited the attorneys' participation: "If either of you had any interest in respect to your respective clients in terms of examining or questioning any of the evidence that might be presented before the court I would like to hear that. . . . [I]f there were to be information that could help me evaluate this better it would be appreciated." R. at 238. Before closing, the court again invited counsel to cross-examine any of the witnesses or make any other comments. Id. at 307. Counsel for Baum and his insurer declined all of the court's invitations to participate and "examine the evidence."

If Dr. Randle's testimony was "brief," it was only because he had prepared a thorough report setting out the plaintiff's damages, which the court had reviewed before trial. See id. at 245. Thus, there was no need for Dr. Randle to testify at length. Moreover, Judge Young did not accept Dr. Randle's figures uncritically. In fact, he criticized them as being perhaps too conservative, id. at 308, and actually increased Dr. Randle's figures for the present value of future income loss by 20 percent, id. at 309.

In short, Baum did not meet his burden of showing a meritorious defense. In any event, he had every opportunity to present his defense to the court earlier but deliberately chose not to. Therefore, the trial court did not abuse its discretion in refusing to set aside the default judgment. See Simon, 782 F. Supp. at 1230.

IV.

SLINGERLAND WILL BE PREJUDICED IF THE DEFAULT JUDGMENT IS SET ASIDE.

Finally, Baum claims that Slingerland will not be prejudiced if the default judgment is set aside. He further claims that Slingerland never claimed or offered any evidence of prejudice in his memorandum in opposition to Baum's motion to set aside the default judgment and therefore cannot raise the issue of prejudice for the first time on appeal.

Admittedly, Slingerland did not claim prejudice below. That is because the issue of prejudice was never properly before the trial court. The issue of prejudice does not even arise until after the movant has established a prima facie case entitling him to relief from the judgment. The court may then consider whether or not the plainitff will be prejudiced if the judgment is set aside. The lack of prejudice, standing alone, is not sufficient to justify setting aside a default judgment. See, e.g., United States v. Proceeds of Sale of 3,888 Pounds Atlantic Sea Scallops, 857 F.2d 46, 49 (1st Cir. 1988); Barry Howard & Assocs., Inc. v. Indiana Transp. Museum, Inc., 125 F.R.D. 487, 491 (S.D. Ind. 1989). On the other hand, even if the movant clearly shows a sufficient excuse for the default judgment, timeliness and a meritorious defense, the court still has discretion to deny relief if to do so would prejudice the plaintiff. Cassidy v. Tenorio, 856 F.2d 1412, 1415 (9th Cir. 1988). In other words, the existence or lack of

prejudice is simply one factor the trial court can consider in the exercise of its sound discretion to grant or deny relief. See Maine Nat'l Bank v. F/V Cecily B (O.N. 677261), 116 F.R.D. 66, 69 (D. Me. 1987). But the burden was on Baum to show that granting relief from the judgment would not prejudice Slingerland. See Allegheny Int'l Credit Corp. v. Virginia Chain Distribs., Inc., 97 F.R.D. 17, 19 (W.D. Pa. 1982).

Baum's moving papers did not make out a prima facie case entitling him to relief from the judgment. See R. at 169-79; see also supra pts. I-III. Nor did he meet his burden of showing that Slingerland would not be prejudiced if the judgment were set aside. See id. Therefore, Slingerland did not have to address the issue of prejudice in his memorandum, and the court did not err in not reaching the issue.

Although the trial court did not expressly address the issue of prejudice--and this court need not reach the issue--the prejudice to Slingerland is readily apparent from the record, and this court can affirm the trial court's decision on any proper ground. See, e.g., Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988).

In addition to the usual prejudice resulting from delay, such as faded memories and stale evidence, Slingerland would be prejudiced by an order setting aside the default judgment in this case for at least three reasons. First, setting aside the judgment would delay Slingerland's recovery and thus cause him further

economic loss. See Allegheny, 97 F.R.D. at 19. Second, if the judgment were vacated, Slingerland would lose his priority over Baum's other creditors. See Northwest Acceptance Corp. v. Bles Studs, Inc., 803 P.2d 775, 778 (Or. Ct. App. 1990), review denied, 812 P.2d 828 (Or. 1991). Third, Slingerland has already gone to the time and expense of trying his damage claims once and would be forced to incur those expenses all over again. At the damage trial, witnesses from Logan, Utah, and Fresno, California, testified. See R. at 242 & 283. Slingerland would have to bring them to Salt Lake City to testify again, and they would be put to the added inconvenience of having to testify a second time. Cf. Master v. LeSeuer, 13 Utah 2d 293, 373 P.2d 573, 573 (1962) (where the plaintiff had traveled from Washington to testify at the default hearing and independent witnesses had been called, the trial court did not abuse its discretion in denying relief from a default judgment).

CONCLUSION

The defendant's own testimony showed that his decision to suffer a default judgment was an informed, deliberate, tactical decision. Thus, he failed to meet his burden of showing mistake, inadvertence or excusable neglect that would justify setting aside the default and default judgment. The defendant also failed to meet his burden of showing that his motion was timely, that he had a meritorious defense to the plaintiff's claims and that the

plaintiff would not be prejudiced if the judgment were set aside. Accordingly, under the facts of this case, the trial court did not abuse its discretion in refusing to set aside the default and default judgment. The judgment of the trial court should therefore be affirmed.

DATED this 28th day of April, 1993.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the above and foregoing Brief of Appellee were mailed, postage prepaid thereon, this 28th day of April, 1993, to:

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PS21.62

A D D E N D U M

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.